

NO. 42611-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN GRANTHAM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George L. Wood, Judge
The Honorable Ken Williams, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. THE COURT ERRED IN ENTERING THE RESTITUTION ORDER BEYOND THE 180-DAY TIME LIMIT.	4
a. <u>The continuance to April 28 was not based on</u> <u>“good cause.”</u>	5
b. <u>Grantham did not waive his right to speedy setting of</u> <u>restitution and the doctrine of “equitable tolling” does</u> <u>not apply.</u>	6
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Finkelstein v. Security Properties, Inc.</u> 76 Wn. App. 733, 888 P.2d 161 <u>review denied</u> , 127 Wn.2d 1002 (1995)	8
<u>State v. Davison</u> 116 Wn.2d 917, 809 P.2d 1374 (1991).....	5
<u>State v. Duvall</u> 86 Wn. App. 871, 940 P.2d 671 (1997).....	6, 8
<u>State v. Johnson</u> 96 Wn. App. 813, 981 P.2d 25 (1999).....	5, 6
<u>State v. Lohr</u> 164 Wn. App. 414, 263 P.3d 1287 (2011).....	8
<u>State v. Moen</u> 129 Wn.2d 535, 919 P.2d 69 (1996).....	4, 5, 9
<u>State v. Sweet</u> 90 Wn.2d 282, 581 P.2d 579 (1978).....	7
<u>State v. Tetreault</u> 99 Wn. App. 435, 998 P.2d 330 <u>review denied</u> , 141 Wn.2d 1015 (2000)	5
<u>State v. Valdobinos</u> 122 Wn.2d 270, 858 P.2d 199 (1993).....	6, 7
<u>State v. Wilcox</u> 20 Wn. App. 617, 581 P.2d 596 (1978).....	7

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

<u>Irwin v. Department of Veterans Affairs</u> 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990).....	9
--	---

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.753	5
RCW 46.52.010	1

A. ASSIGNMENTS OF ERROR

1. The court erred in entering a restitution order after the 180-day statutory time limit expired.

2. The court erred in entering finding of fact 3 and conclusion of law 1 in support of its order denying the defense motion to set aside the restitution order.

Issue Pertaining to Assignments of Error

Where the trial court continued the restitution hearing based on the prosecutor's mistaken assurance the new date was within the statutory deadline, and where there is no evidence the defendant acted in bad faith in assenting to such a continuance, must this Court reverse the restitution order?

B. STATEMENT OF THE CASE

The Clallam County prosecutor charged Jonathan Grantham with residential burglary, first degree theft, first degree possession of stolen property, second degree unlawful possession of a firearm, and "hit and run,"¹ a misdemeanor. CP 50-61. On October 21, 2010, Grantham pled guilty to all counts, and the court entered a judgment and sentence ordering restitution, but finding the amount was "[to be determined]." CP 34, 40-49; RP 2-18. Grantham initially waived his presence at the

¹ RCW 46.52.010.

restitution hearing, which was scheduled for January 21, 2011. CP 35; RP 18.

On January 21, 2011, the prosecutor informed the court he was still consulting with the victim to calculate the amount of restitution and moved for a continuance. Defense counsel agreed to the continuance. The hearing was set for February 25. CP 91.

On February 25, the prosecutor again requested a continuance. Grantham's counsel assented, explaining he would need to review the alleged restitution amounts with Grantham. CP 90. The court continued the restitution hearing to April 1.² Id.

The next hearing was inexplicably held on March 2 rather than April 1. Grantham, incarcerated at Clallam Bay Corrections Center, appeared telephonically. Grantham rescinded the waiver of his presence at the restitution hearing. CP 71-72. Ralph Anderson moved to withdraw as Grantham's counsel. CP 72-73. The prosecutor did not object to the withdrawal and informed the court (incorrectly) that the 180-day restitution deadline expired on April 28. CP 73-74.

² Grantham's by then former attorney, Ralph Anderson, was present in court on April 1 and informed the court that he was no longer representing Grantham and that the hearing had been stricken. CP 85.

The court granted counsel's motion to withdraw and confirmed Grantham wanted another attorney. CP 74. The court asked attorney Drew Lauer, who was present in the courtroom, if he was available to represent Grantham. CP 75-76. Lauer tentatively agreed but advised the court he knew nothing about the case. CP 76.

The court suggested setting the restitution hearing for April 28. The prosecutor reiterated that the April 28 was within the 180-day time limit. CP 76. After obtaining both parties' assent, the court set the hearing for April 28. CP 76-77.

The April 28 hearing was continued to June 2 because Grantham was in Snohomish County on another case. CP 83-84. The June 2 hearing was continued to June 9 for good cause on the State's motion because its witness was unavailable. CP 82.

On June 9, a different prosecutor appeared and informed the court the original prosecutor was in trial. RP 19. Grantham contended the 180-day statutory time limit for ordering restitution had passed. He acknowledged, however, that he agreed to the previous continuance from June 2 based on witness unavailability. RP 20. The court found good cause to continue the hearing one week to allow the original prosecutor to appear on behalf of the State. RP 21-22.

The original prosecutor appeared at June 16 hearing. He explained he learned the day before the scheduled June 9 hearing that he would be unable to appear due to the unexpected setting of two other trials. RP 28-30; CP 7. Grantham reiterated his objection to the previous continuance. RP 24-27, 31. The court noted it had found good cause for the continuance, based in part on the court's knowledge the original prosecutor had been handling the case all along. RP 32.

The court ordered Grantham to pay \$58,174.65 subject to certain offsets and subject to further argument and briefing on the defense objection. RP 51, 54-70, 72-77; CP 10-22. The court later entered findings and conclusions denying Grantham's motion to set aside the restitution order on the grounds it was untimely. CP 6-9.

Grantham appeals the restitution order.

C. ARGUMENT

1. THE COURT ERRED IN ENTERING THE RESTITUTION ORDER BEYOND THE 180-DAY TIME LIMIT.³

The 180-day period for setting restitution expired on April 19, 2011. While a continuance was granted to a date after that point, the court

³ Grantham objected to the restitution order, although not on the precise grounds set forth in this brief. The error may nevertheless be raised for the first time on appeal because the restitution order exceeds the sentencing court's statutory authority. State v. Moen, 129 Wn.2d 535, 543-44, 919 P.2d 69 (1996).

never found good cause to continue the hearing past the 180-day deadline. Grantham, moreover, did not waive his right to a timely setting of restitution. The untimely restitution order must, accordingly, be reversed.

- a. The continuance to April 28 was not based on “good cause.”

A trial court's authority to enter restitution is derived solely from statute. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). When restitution is ordered, the court must determine the amount at sentencing or within 180 days of sentencing. RCW 9.94A.753(1). The court may continue the restitution hearing for good cause, but the request for a continuance must before the 180-day period expires. RCW 9.94A.753(1); see State v. Tetreault, 99 Wn. App. 435, 437-38, 998 P.2d 330, review denied, 141 Wn.2d 1015 (2000), and State v. Johnson, 96 Wn. App. 813, 816, 981 P.2d 25 (1999) (reversing restitution orders entered beyond the statutory limit). Restitution is not intended to replace a victim's civil remedies. RCW 9.94A.753(9).

An untimely restitution order must be reversed regardless of whether the defendant shows prejudice. State v. Moen, 129 Wn.2d 535, 548, 919 P.2d 69 (1996). The statutory time limit operates as a statute of limitations. As such, it is “subject to principles of waiver and estoppel,

including the doctrine of equitable tolling.” State v. Duvall, 86 Wn. App. 871, 874-75, 940 P.2d 671 (1997).

Here, on March 2 the court could not have found “good cause” to continue the hearing beyond the 180-day limit because the prosecutor repeatedly misrepresented that the continuance he sought was within the 180-day limit. CP 73-74, 76; see Johnson, 96 Wn. App. at 817 (“good cause” requires a showing of some external impediment that did not result from self-created hardship that would prevent a party from complying with statutory requirements).

- b. Grantham did not waive his right to speedy setting of restitution and the doctrine of “equitable tolling” does not apply.

Moreover, Grantham never waived his right to a timely setting of restitution. Nor is “equitable tolling” an appropriate remedy, given the narrow scope of that doctrine.

The 180-day limit on ordering restitution is a statutory procedural right that may be waived. See State v. Valdobinos, 122 Wn.2d 270, 274, 858 P.2d 199 (1993) (“Waiver [of right to timely trial] may be implied from a defendant's request for a continuance.”). A waiver is an intentional relinquishment or abandonment of a known right or privilege and must be knowing, intelligent, and voluntary. State v. Sweet, 90 Wn.2d 282, 286,

581 P.2d 579 (1978); State v. Wilcox, 20 Wn. App. 617, 619, 581 P.2d 596 (1978).

In Valdobinos, the Court found that despite the absence of a formal written speedy trial waiver, the defendants waived their right by orally agreeing to waive speedy trial and requesting continuances beyond the speedy trial deadline. 122 Wn.2d at 275-76.

Grantham's case is distinguishable. On March 2, Grantham's withdrawing counsel told the court that a continuance beyond April 1 (but not to any specific date) would be necessary. The prospective replacement attorney agreed that a continuance would be necessary because he was unfamiliar with the case, but again was not specific as to the amount of time required. An essentially unrepresented Grantham, appearing telephonically, agreed to the new hearing date; however, that "agreement" occurred only after being told repeatedly that April 28 fell within the statutory time limit. CP 71-77.

Because the State cannot demonstrate any agreement by Grantham was "knowing, intelligent and voluntary" – indeed, Grantham has demonstrated the opposite – no waiver occurred. Wilcox, 20 Wn. App. at 619. Agreement to subsequent continuances is irrelevant because the 180-day time limit had already expired.

The court later found that “[o]n Mar. 2, 2011, the restitution hearing set for Apr. 1 . . . was continued to Apr. 28 . . . because the defendant’s attorney withdrew without objection from the defendant, new counsel was appointed, and the defendant, who was in prison, demanded to be present for the hearing.”⁴ But Grantham challenges this finding to the extent that it oversimplifies and therefore misrepresents what occurred at the March 2 hearing. See State v. Lohr, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (appellate court reviews findings of fact for whether substantial evidence supports them and whether findings support its conclusions of law). This Court should accordingly reject any assertion the findings supports a finding of waiver, or a finding that the continuance was based on good cause.

Next, a court may “toll” an ordinary statute of limitations (as the 180-day limit is considered) under appropriate circumstances including “bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff.” Duvall, 86 Wn. App. at 875 (quoting Finkelstein v. Security Properties, Inc., 76 Wn. App. 733, 739-40, 888 P.2d 161, review denied, 127 Wn.2d 1002 (1995)). But courts should permit equitable tolling only sparingly, and should not extend the doctrine to a “garden variety claim of excusable neglect.” Duvall, 86 Wn. App. at

⁴ CP 6 (Finding of Fact 3)

875 (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 94–96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)).

Here, the State cannot come close to establishing the requirements of equitable tolling. There is no evidence of bad faith by Grantham. Again, Grantham only assented to the continuance to April 28 after being informed it was within the time limit. Moreover, the State’s apparently negligent misrepresentation of the expiration date to both the court and Grantham cannot be considered “due diligence.” The doctrine of equitable tolling is patently inapplicable.

Because the court continued the restitution hearing beyond the 180-day limit based on State’s motion absent “good cause” for such an extension, and because the doctrines of waiver and equitable tolling do not apply, the untimely restitution order must be stricken. Moen, 129 Wn.2d at 548.

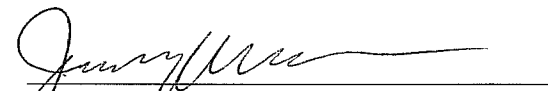
D. CONCLUSION

For the foregoing reasons, the restitution order should be stricken.

DATED this 23rd day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 42611-1-II
)	
JONATHAN GRANTHAM,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF FEBRUARY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN GRANTHAM
DOC NO. 801853
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF FEBRUARY, 2012.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 23, 2012 - 2:56 PM

Transmittal Letter

Document Uploaded: 426111-Appellants' Brief.pdf

Case Name: Jonathan Grantham

Court of Appeals Case Number: 42611-1

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**

A copy of this document has been emailed to the following addresses:

bwendt@co.clallam.wa.us